Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Children's Television Obligations of Digital Television Broadcasters

MM Docket No. 00-167

COMMENTS OF THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.

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Executive Summary

ALTV believes it is premature to extend the children's television rules to digital broadcasting at this point in time. As Commissioner Powell observed in his separate statement to the *Notice of Proposed Rule Making:*

> It seems to me premature to attempt to fix public interest obligations to a service that has yet to blossom. For example, the NPRM seeks comment on whether the Commission should prohibit all links to commercial Internet sites, a capability that is not even available today on broadcast television. In my view, the wiser course would have been to initiate an Inquiry at a time when we understand more about the proposed or likely applications of digital television, so our proposal would bear some plausible nexus to the service itself, rather than its potential. At a minimum, I would have preferred that any public interest obligations be considered in the broader DTV proceeding.

The FCC has failed to provide a factual or legal basis for extending these rules to digital television stations. There has been no evidence of a market failure for the provision of core children's program in the digital world. To the contrary, there is every reason to believe that the digital television marketplace will provide such programming.

Imposing strict requirements on digital broadcasters at this point in time is contrary to the public interest. For example, extension of the commercialization and three hour quantitative programming requirements could prevent the development of speciality channels and unique ancillary services that meet the needs of children. Limitations on website links could all but eliminate the interactivity in the context of children's programs. Redefining commercial matter to include station promotions and even public service announcements will make children's programs less attractive and may prevent children from accessing beneficial public service announcements.

The FCC seeks to impose regulations developed in the analog world onto digital television without any evidence that the digital world will fail to provide such programming. The Commission should let the digital television marketplace develop before imposing such regulations. Ironically, it is the lack of FCC action in a number of areas that is delaying the deployment of digital television.

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In the Matter of **Children's Television Obligations of Digital Television Broadcasters**	**MM Docket No. 00-167**

COMMENTS OF THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.

The Association of Local Television Stations, Inc. ("ALTV"), hereby submits its comments in response to the Commission's *Notice of Proposed Rule Making* in the above captioned proceeding.[1] ALTV is a non-profit, incorporated association of local television stations that are primarily affiliated with the newer, emerging broadcast networks such as Fox, UPN, WB, PAX, as well as traditional independent stations. We have been active participants in the digital public interest proceeding.[2]

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[1] *Notice of Proposed Rule Making* in MM Docket No. 00-167, FCC 00-344 (released October 5, 2000) (hereinafter cited as *Notice*)

[2] Comments of Association of Local Television Stations in MM Docket No 99-360, March 27, 2000; Reply Comments of the Association of Local Television Stations in MM

I. EXTENSION OF CHILDREN'S TELEVISION RULES TO DIGITAL BROADCASTING IS PREMATURE

Any material redefinition or expansion of the children's television obligations to digital television at this point in time is premature. Digital television broadcasting is at best an infant service, struggling not only to find its identity, but also just to breathe in an uncertain, even hostile, environment. Rather than strap digital broadcasting with new regulatory obligations, the Commission should pay heed to its own "overarching goal ... to promote the success of free, local television service using digital technology. [3] We agree with Commissioner Powell's assessment of the situation:

> It seems to me premature to attempt to fix public interest obligations to a service that has yet to blossom. For example, the NPRM seeks comment on whether the Commission should prohibit all links to commercial Internet sites, a capability that is not even available today on broadcast television. In my view, the wiser course would have been to initiate an Inquiry at a time when we understand more about the proposed or likely applications of digital television, so our proposal would bear some plausible nexus to the service itself, rather than its potential. At a minimum, I would have preferred that any public interest obligations be considered in the broader DTV proceeding.[4]

Now is not the time to reflexively attach a burdensome regulatory regime to digital television. Given the status of the over-the-air digital marketplace, the FCC should proceed cautiously.

Docket No. 99-360, April 25, 2000.

[3] *Fifth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 12809 (1997) [subsequent history omitted](hereinafter cited as *Fifth Report and Order.*)

[4] Separate Statement of the Hon. Michael Powell, Notice of Proposed Rulemaking in MM Docket Nol 00-167, FCC 00-344, (released October 5, 2000)

A. The FCC Has No Experience with the Digital Marketplace.

It is worth remembering that the analog NTSC television system was in place for more than a decade before the FCC began the process of enacting regulatory requirements for children's television. As the *Advisory Committee* observed, the general public interest standard did not explicitly mention the needs of children until the *1960 En Banc Program Policy Statement*, where children's programming was cited as one of the 14 components "usually necessary to meet the public interest, needs and desires of the community."[5] Indeed, specific, non-quantitative, policies governing children's educational television obligations were not adopted until the 1970s, almost twenty years from the beginning of television service. The present quantitative rules were not adopted until the mid 1990s.

We are not stating that the FCC should wait for forty years before addressing regulatory issues with respect to digital television. For analog television, the government waited until the industry had a chance to mature, before beginning the process of imposing specific content based regulations, including children's regulations. Such an approach not only gave the industry time to become viable economically, but it gave the government time to determine how best to use the medium to meet the educational and informational needs of children. This is a lesson well learned.

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[5]Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, *Charting the Digital Broadcasting Future: Final Report of the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters*, December 18, 1998 at 28-29. (hereinafter cited as *Advisory Committee Report*)

The Advisory Committee reflected this cautious approach to regulations that could govern free, over-the-air television broadcasting,

> Nobody knows what the digital future holds for broadcasters, their viewers, their advertisers or their competitors. It is true that broadcasters were granted use of an extremely valuable piece of the electromagnetic spectrum to transition to the digital age. It is also true that to do so, broadcasters will have to make large capital outlays to purchase equipment, erect towers or antennas and convert programming to digital formats -- with no clear picture of what will happen to their revenue...
>
> Additionally, it is conceivable that broadcasters who apply multiplexing will simply cannibalize their single signal, achieving no additional revenues or perhaps merely stabilizing current market share. We recognize these facts. We also accept the principle that there should be some additional benefit to the public ***if*** its grant to broadcasters of the valuable digital television spectrum results in enhanced economic benefits for broadcasters.[6]

The Advisory Committee did not recommend the adoption of any specific quantitative content based regulations. To the contrary the *Advisory Committee* conditioned regulations on two important facts. New regulations would be appropriate *only* if the grant of digital spectrum first resulted in "enhanced economic benefit to broadcasters."[7] This makes perfect economic sense. It would be illogical for the government to impose additional, costly, regulatory burdens on an industry which is not generating sufficient additional revenues. The simple fact is that the shift to digital has not resulted in a revenue windfall for broadcasters. Absent revenue generation, new public interest obligations, including new children's obligations should not be extended.

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[6] *Advisory Committee Report* at 54-55.

[7] *Advisory Committee Report* at 55. *See also,* Separate Statement Charles Benton *et. al.*, at 73, (Criticizing the majority report, and arguing that the FCC should not consider broadcaster revenues in determining whether new public interest obligations attach.).

Moreover, as the *Advisory Committee Report* stated, given the uncertainties of the hypothetical digital market, the government should not adopt new regulations or fees until there has been significant digital penetration in the market.[8] After this level has been achieved, the government should begin a two year moratorium during which digital broadcasters can experiment and explore multiplexing options in the marketplace without any undue hindrance.[9]

The *Notice* simply ignores this sage advise, and proceeds to propose new children's television regulations on digital broadcast stations. The FCC forges ahead despite the fact that the digital roll out has all but stalled. While there are over 167 digital television stations on the air, we are no closer to deploying digital television than we were when the Advisory Committee issued its report in 1998. While broadcasters have kept their part of the bargain by meeting the build out schedule, there are few digital receivers in the hands of consumers, almost no digital stations carried on cable systems, and a mountain of technical issues to resolve..

The *Notice* is an attempt to impose rules and regulations from an analog regime on to digital. Unfortunately, the government does not know the nature or shape of the nascent digital television market. The evolution of the digital television market may be vastly different from the traditional analog television market. To be sure, local television stations will continue to provide

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[8] *Id.* at 54.

[9] *Id.* at 55.

a main free, over-the-air television channel. However, the FCC must be careful not to superimpose its analog regime on to digital, lest it unintentionally stifle innovation.

> Whatever requirements are assessed must be attentive to the risk that they might have unintended harmful consequences, such as discouraging multiplexing at all. And such requirements should be sensitive to the opportunities multiplexing can offer for underserved constituencies to speak in their own voices, and for enhanced minority participation in broadcasting, including opportunities in management and ownership. The FCC should make clear that if a broadcaster uses its extra capacity for public interest purposes like an all news channel or children's educational channel, it will not incur extra obligations.[10]

The one size fits all model that has been the traditional approach to regulating children's television in the analog world may be highly inappropriate for digital broadcast television.

B. There Is No Factual Basis for Extending the Children's Programming Obligation to Digital Television Stations.

No rational basis exists for alleging some seminal failure on the part of local television stations to provide *digital* service that meets the core educational and informational needs of children. No factual predicate has been established demonstrating that the embryonic over-the-air digital television broadcasting service will fail to meet the educational and informational needs of children.[11] To the contrary, the *Notice* simply presumes that the facts which lead to the enactment of the Children's Television Act, and the FCC rules implementing the Act in the

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[10] *Advisory Committee Report* at 55.

[11] *See Motor Vehicle Mfr. Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43(1983) (There must be a rational connection between the facts found and the regulatory choice made.)

analog world, are applicable to the digital television world. However, no evidence has been presented demonstrating that such a presumption is accurate.

There is every reason to believe that the economics of digital multicasting and new digital services would lead to the provision of ample amounts of core children's educational and informational programming. When adopting its analog children's television rules, the FCC observed that the broadcasters have reduced economic incentives to air children's programs in general, and educational programs in particular, because children constitute a small segment of the audience.[12] According to the Commission, the economics of providing free, general audience entertainment creates an incentive not to provide programming to discrete segments of the audience.

This may not be the case in the digital television world. For example, children's networks are a direct result of an economic model based on "narrowcasting," where the existence of multiple channels makes it profitable to focus a specific channel on a discrete segment of the audience, *i.e.,* children. This model may very well be realized in the over-the-air digital environment, where there are multiple over-the-air digital television stations in a market providing "multi-cast" services. It is likely that there may be one or more free, over-the-air

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[12]*Report and Order* in MM Docket No 93-48, 11 FCC Rcd. 10660, 10674-10675 (1996) (hereinafter cited as *Children's Order*) Of course we continue to disagree with the FCC's assessment of the children's marketplace. Nonetheless, to the extent a market failure was critical to the imposition of new children's regulations, the FCC has failed to document a market failure with respect to digital television.

digital channels devoted exclusively to children's programs. Accordingly, the factual predicate justifying the regulatory approach to increase the amount of children's educational programming in the analog world may be wholly irrelevant in the digital world.

Absent any evidence of a market failure for the provision of children's educational programming in a digital world, there is simply no basis for imposing additional children's educational requirements on digital stations. Even if such regulations were reasonable in the analog world, they may be unreasonable if extended to the digital world.[13] The Commission is seeking a regulatory response to a problem that is non-existent at this time.

Even if the Children's Television Act applies to digital television stations, this does not mean that the FCC's three hour quantitative approach to implementing the statute in the analog world can be lawfully extended to digital over-the-air television broadcasting. As discussed, *infra*, the three hour requirement is *not* statutory. It would be arbitrary for an administrative agency to enact new regulations without first establishing a need for these regulations.

Throughout the entire process, the Commission has encouraged flexibility and reliance on marketplace responses to mold digital services. While the *Notice* solicits comment on a variety of proposals, it is clear that it has abandoned a purely flexible approach to regulating in

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[13]*See, e.g. Home Box Office, Inc. v. Federal Communications Commission*, 567 F.2d 9,36 (D.C. Cir 1977) ([A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.")

this area. To now impose a new regulatory approach runs counter to previous expressions of the FCC's approach to digital television.[14]

C. Imposing Rules Will Delay the DTV Roll Out

Finally, given the tremendous strains on the digital roll out, the distraction of coping with new, perhaps more onerous children's television obligations may diminish local television stations' attention to the true task at hand -- the expeditious deployment and successful development of a digital television broadcasting system that reflects their continuing and ongoing commitment to children's television. Local television stations already are coping with considerable risks, many of which were anticipated, some of which were not. The government's willingness to impose potentially costly regulations before the service commences operation sends the wrong signal to the investment community.

Ironically, the Commission is directly responsible for much of the uncertainty and the delay in the deployment of digital television. For example, contrary to the *Advisory Committee's* recommendations, the FCC refuses to enact digital must carry rules, a key element in the

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[14]*See, Greater Boston Television Corp. V. FCC*, 444 F.2d 841,852 (D.C. Cir 1970) "[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerable terse to the intolerably mute."

successful deployment of digital television.[15] The FCC must enact set manufacturing standards that ensure that television receivers sold in the United States are capable of receiving analog and over-the-air digital transmissions.[16] Furthermore, even if a reliable signal could be assured either off-air or via cable, consumers still face uncertainty with respect to the roll out of digital receivers. Delays in standard setting have arrested receiver manufacture and sales.[17] Copyright protection concerns continue to raise significant issues. Finally, both the Commission and the industry have not yet resolved critical issues pertaining to the digital transmission standard. Hopefully, this issue will be resolved in the near future.

II. THE FCC'S LEGAL AUTHORITY TO IMPOSE NEW CHILDREN'S TELEVISION REQUIREMENTS IS NOT UNBRIDLED.

A. The Children's Television Act Does Not Compel Extension of the Three Hour Quantitative Rule to Digital Television.

As the *Notice* acknowledges, the Children's Television Act does not expressly grant the Commission the authority to extend the children's television requirement to digital

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[15]As the Advisory Committee stated, "To preserve the benefits of free, over-the-air broadcast television" in a digital world, the Advisory Committee recommends that appropriate governmental authorities adopt ways, including digital "must carry" by cable operators, to expedite the widespread availability of digital broadcast television tot he public. *Advisory Report* at 49.

[16]*See e.g., Electronic Media*, November 27, 2000 at 1.

[17]*See Electronic Media*, December 4, 2000c, at 1 (CEA complains that cable's failure to agree to technical standards has stymied manufacturing of DTV receivers.)

transmissions.[18] The *Notice* interprets the CTA broadly, and concludes that its provisions should not be limited to analog broadcasts. Nonetheless, there is nothing in the statute and the legislative history that expressly extends these provisions to digital broadcasts. The quantitative processing guidelines were not mandated by the statute. To the contrary, the CTA expressly recognized that a station could look to its non-programming efforts as well as supporting programs on another station when meeting its children's educational programming obligations.[19]

Absent specific statutory authority, the *Notice* falls back on the avowed purpose of the statute, "to increase the amount of educational and informational broadcast television programming available to children."[20] We believe it is legally insufficient to argue that the rules should apply to digital broadcasts simply because the government presumes (without evidence) that the underlying goals of the Children's Television Act will be fostered. As noted previously, the FCC has offered no evidence to indicate that the proposed regulations are necessary to increase the amounts of educational programs or to protect children from over commercialization in the digital world. Indeed, superimposing the analog children's rules may have the opposite effect.

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[18] *Notice* at 6. .

[19] 47 U.S.C. §303(b)

[20] *Notice* at 6.

B. The Public Interest Language Found in Section 336(d) Does Not Compel Extension of the Children's Television Requirements.

The Commission attempts to buttresses its position by relying on §336(d) of the Communications Act, which states:

> Nothing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity. In the Commission's review of any application for renewal of a broadcast license for a television station that provides ancillary or supplementary services, the television licensee shall establish that all of its program services on the existing or advanced television spectrum are in the public interest. Any violation of the Commission rules applicable to ancillary or supplementary services shall reflect upon the licensee's qualification for renewal of its license.[21]

According to the *Notice*, *all* of the CTA's commercial and educational programming requirements apply because of the "explicit congressional intent expressed in section 336 to require digital broadcasters to service the public interest."[22] The public interest language in this provision, however, does not necessarily justify extension of the CTA or the FCC's children's television rules.

First a noted previously, the general public interest standard in the Communications Act does not compel application of the three hour quantitative rule. The FCC renewed broadcast licenses under the public interest standard for over thirty years without a children's quantitative programming requirement.

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[21]47 U.S.C. §336(d)

[22]*Notice* at 6.

Second, the CTA did not change this approach, as there are no quantitative requirements in the Act. Section 336(d) merely indicates that a station providing ancillary and supplementary services remains obligated under the general public interest standard. In no way can this language be construed to mean that quantitative children's requirements will necessarily apply to all portions of a station's digital transmission. Indeed, §336(a)(2) clearly contemplates that a television station may transmit non-broadcast information such as data services over its spectrum. Applying the CTA's programming and commercial requirements to such ancillary transmissions could effectively prevent a station from providing non-broadcast ancillary and supplementary services, a result that defeats the entire purpose of the statute.

Third, it is worth noting that the FCC's general public interest standard is not so limited as to encompass only the broadcast related rules and regulations. Indeed, Commission decisions regarding non-broadcast information sources including common carriers, cable, MMDS, satellite services, etc. are all governed by an overarching "public interest" standard. The term "public interest" is operationally defined to mean different things depending on the service that is being provided. Section 336(a)(3) instructs the Commission to apply regulations to ancillary services as are applicable to analogous service provided by other persons. Accordingly, the reference to the public interest standard in §336, merely represents a more general indication that the licensee cannot abrogate its basic responsibilities, as determined by the type of service that is being provided.

Accordingly, the FCC may not look to the general public interest reference contained in section 336(b) to justify specific quantitative obligations to provide children's educational and informational programming. Indeed, for over thirty years, the public interest standard applied to broadcast television did not include any specific quantitative requirement for children's educational programs.

C. Even the FCC Cannot Forget the First Amendment

The Commission's authority in the realm of broadcast program content is tightly constrained. No matter how well-intended or appealing the Commission's private notions of what television programming should be, Congress never invested it with more than a very minimal supervisory role over broadcast program content. The strictures of the First Amendment and the Communications Act generally relegate the Commission to review of a local station's *overall* performance in the public interest. They leave no room for the FCC to dictate the types or amounts of programs which local stations must broadcast. These limitations on the Commission's authority hardly evaporate in the hail of digital packets that will convey broadcast programming to viewers.

While the public interest standard is a "supple instrument", it is not unlimited as it applies to content based regulations. In 1972 the Supreme Court stated that "the Government's power

over licensees...is by no means absolute and is carefully circumscribed by the Act itself."[23] Therein the Court left no doubt that the Commission's authority extended only to the point of evaluating a local television station's overall performance.

> Congress has affirmatively indicated in the Communications Act that certain journalistic decisions are for the licensee, subject only to the restrictions imposed by evaluation of its overall performance under the public interest standard.[24]

The Court reiterated that a licensee may be "held accountable for the totality of its performance of public interest obligations."

In *Turner Broadcasting System v. FCC*, the Court confirmed the Commission's limited authority over broadcast program content:

> [T]he argument exaggerated the extent to which the FCC is permitted to intrude into matters affecting the content of broadcast programming. The FCC is forbidden by statute from engaging in "censorship" or from promulgating any regulation which shall interfere with the [broadcasters'] right of free speech" 47 U.S.C. §326. The FCC is well ware of the limited nature of its jurisdiction, having acknowledged that it "has no authority and, in fact is barred by the First Amendment and [§326] from interfering with the free exercise of journalistic judgment." *(citations omitted)* In particular, the FCC's oversight responsibilities do not grant it the power to order any particular type of programming that must be offered by broadcast stations; for although "the Commission may inquire of licensees what they have done to determine the need of the community they propose to serve, the Commission may not impose upon them it private notions of what the public ought to hear.*(citations omitted)*

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[23]*Columbia Broadcasting System, Inc., v. Democratic National Committee*, 421 U.S. 94, 126 (1972).

[24]*Id.* at 120

> Indeed, our cases have recognized that Government regulation over the content of broadcast programming must be narrow, and that broadcast licensees must retain abundant discretion over programming choices.[25]

In summary, the FCC's decision to move forward with specific children's regulations now is, at best, premature. Moreover, absent evidence that the digital market will not serve the educational and informational needs of children, the FCC has no basis to superimpose a regulatory regime designed to address problems in the analog television market to the digital world. As noted above, such an extension is problematic from an administrative law and First Amendment perspective.

III. SPECIFIC PROPOSALS CONTAINED IN THE NOTICE ARE COUNTER PRODUCTIVE

A. Application of Children's Rules to Multiple Video Streams

The Commission's uncertain regulatory footing is evident from the nature and scope of the questions raised in the Notice.

> We invite comment, however, on how the guidelines should be applied in light of the myriad of possible ways that broadcaster may choose to use their DTV spectrum. Should the processing guideline apply to only one digital broadcasting program stream, to more than one program stream, or to all program streams the broadcaster chooses to provide. Should the guideline apply only to free broadcast services, or also to services offered for a fee.[26]

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[25] *Turner Broadcasting System v. FCC,* 512 U.S. 622; 114 S.Ct. 245; 1994 U.S. LEXIS 4831, 53; 129 L.Ed. 2d 497;

[26] *Notice* at 7.

The questions asked by the notice evidence the need for delaying the extension of analog children's television rules to digital broadcasting. At best this proceeding should have been framed as a *Notice of Inquiry*. It is plain that the Advisory Committee's observation in 1998 hold true today - nobody knows what the digital television marketplace will look like. [27] Applying any rules at this time will simply act to stifle news and innovative services that will enhance the quality of children's television in the United States.

A local television station's compliance with its children's programming obligation should be based on an evaluation of its overall programming performance across all free, broadcast digital services. For example, the station should not be required to provide educational and informational programming for children on each channel that is offered for free. If a station were providing multiple simultaneous program services, then it should be considered to have fulfilled its obligation to provide children's educational and information programming, even if no children's programming appeared on other program services offered by the station.[28]

As a practical matter, a requirement that forced stations to broadcast children's educational programs on each channel would pre-empt licensee decisions to provide specialized channels, such as an all news channel or even a channel exclusively for political candidates. Therefore, looking to a local television station's performance across all its free, broadcast channels is a sound approach from many perspectives.

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[27]*See, supra* at

[28]*See* Comments of ALTV in MM Docket No. 99-360, March 27, 2000.

B. Extension of Children's Television Rules to Non-broadcast Ancillary and Supplemental Services

In a similar vein, we do not believe the children's programming requirements would be applicable to ancillary and supplementary services that may be provided by a digital television station. To begin with such services may not be in the traditional form of broadcasting.

> Consistent with precedent that has treated telecommunications services provided by an NTSC station other than the regular television program service as ancillary, we will consider as ancillary and supplementary any service provided on the digital channel other than free, over-the-air services. In addition, we will not impose a requirement that the ancillary and supplementary services provided by the broadcaster must be broadcast related.[29]

Accordingly, these services may be pay video services or subscription data services, and clearly beyond the vision of the Children's Television Act. Consistent with section 336(b)(3), ancillary and supplementary services should be regulated like analogous services. They should not be subject to the children's television obligations.

There is simply no legal foundation for extending the children's rules to ancillary and supplemental services. At the outset, Section 336(a)(2) is irrelevant. The phrase, "as may be consistent with the public interest convenience and necessity," as used in that section qualifies the Commission's authority to adopt rules allowing stations to offer ancillary and supplementary services. It does not speak to the types of regulations that may be applicable to such ancillary and supplementary services. In other words, the Commission was authorized to adopt

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[29] *Fifth Report and Order*, 12 FCC Rcd at 1281

regulations that allowed stations to offer ancillary and supplementary services, provided it found it in the public interest for stations to offer such services. The Commission has so interpreted this section, pointing out that "the 1996 Act specifically gives the Commission discretion to determine, in the public interest, whether to permit broadcasters to offer such services."[30] Therefore in reliance on the authority granted in Section 336(a)(2) the Commission decided to permit stations to offer ancillary and supplementary services. The limitation here was that in permitting such services broadcasters may not derogate the free over-the-air service. Nothing in the section requires the Commission to apply broadcast related rules to ancillary services. The section merely defines the FCC's authority to permit these services.[31]

C. The Three Percent Proposal Cannot be Justified.

We oppose the proposal to require broadcasters to devote three percent of their programable broadcast hours per week to core children's educational programs. The proposal is merely an attempt to increase the current requirements. There is no factual justification to increase this obligation.

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[30] *Fifth Report and Order*, 12 FCC Rcd. At 1281.

[31] This interpretation provides for consistency, rather than conflict with Section 336(b)(3). As the Commission has stated, Section 336(b)(3) simply requires the Commission to "apply to any other ancillary and supplementary service such of the Commission's regulations as are applicable to the offering of analogous services by any other person." If section 336(a)(2) were read to impose "broadcast type" public interest obligations to their ancillary and supplementary services, then it would clash with Section 336(b)(3). The correct interpretation of Section 336(a)(2) avoids this conflict.

Under the current processing guidelines for children's educational programming, an analog station is required to broadcast three hours of children's educational programming per week. Supporters for this rule assert that the provision of such core programming is a *quid pro quo* for receiving six MHZ of analog broadcast spectrum. Assuming the argument has some validity (which it does not), then according to the "logic" of the position a digital station should be responsible for providing a maximum of three hours per week of core programming in return for its six MHz of digital spectrum.

The three percent proposal, however, is far more extensive, and unjustifiably increases the regulatory burden on digital broadcasters. According to the proposal, if a station decided to provide multiple channels of digital programming, the licensee would have to devote an amount of time equal to three percent of *each* channel. Thus, if a station offered four channels of free over-the-air SDTV service, the children's programming obligation would presumably increase four-fold, from three hours per week to 12 hours per week.[32] This burden will be imposed despite the fact that the overall amount of spectrum used by the licensee (i.e., six MHz) remains the same.

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[32]The *Notice* asks whether this additional obligation should be applied to each channel or allow broadcaster the flexibility to decide how the programming should be distributed over their various programming streams. If the FCC enacts such a policy, stations should be given the flexibility to determine which video streams will be used to broadcast the programming. Such flexibility is absolutely necessary to develop new and innovative digital service.

Such an approach creates terrible incentives for developing a full digital service, including multiple free, over-the-air digital channels. Stations are effectively penalized,(*i.e.*, regulatory obligations increased), for using spectrum more efficiently and providing additional free, over-the-air digital services.[33] Such a result is contrary to the FCC's long standing policy to develop new, free over-the-air digital services.

The proposal fails on a practical level as well. A station's obligation would vary depending on how a station used its digital channel. For example, a station may decide to broadcast one channel of HDTV. In this instance it would have a three hour per week obligation. Alternatively it may decide to broadcast one channel during some hours, multiple channels of free television during other hours, and finally a mix of free or pay ancillary services during other day parts. The result is that each individual station in a market could have vastly different children's programming obligations. Such a "floating standard" would be administratively burdensome on both the licensee as well as the Commission.

D. Proportional Technical Requirements Are Contrary To The Public Interest

The *Notice* solicits comments on whether the FCC should require broadcasters to provide core educational programming in a certain technical format. According to the proposal, core

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[33]It is not clear whether the proposal in the *Notice* would include non-broadcast, ancillary and supplemental serves as part of a stations "programmable broadcast hours per week." Because such services are not broadcasting, *per se*, ALTV believes they should not be included in any calculation used to determine the amount of children's educational programming that must be provided by the licensee.

educational programming would have to be offered in the same proportion of technological advances that the broadcaster chooses to use in its overall programming.[34] Thus, if a station offered one half of its programming in HDTV, then it must supply one half of its core children's programing in HDTV.

ALTV opposes this incredibly intrusive proposal. The decision to transmit general programming in an HDTV format, as opposed to an SDTV format, depends on the type of programming that is being broadcast. While HDTV may be appropriate for movies or major sporting events, it may not be necessary for other, less visual programs. To force a station to broadcast core educational programs in a format based on some mechanical formula is counter productive. Assume for example a station decides to broadcast a core program using a class-room format. It makes no sense to require this type of programming to be broadcast in HDTV. (You do not need to see the chalk marks in exquisite detail.) Yet the mechanical formula contained in the *Notice* could force this result. The proposal would require a certain amount of core children's program to be produced in more expensive HDTV formats. Such an approach will drive up the costs of providing core educational programs, perhaps leading to a reduction in such programs. Moreover, the market for such expensive programs is far from certain. Each station may have a different technical requirement for core children's programs, because the ratio of HDTV vs. SDTV programs will vary from station to station. Finally, forcing stations to broadcast core educational programming in HDTV may be wasteful, forcing a station to use

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[34] *Notice* at 9.

more spectrum capacity than is necessary for programs that could be broadcast in a non-HDTV format.

E. Pay or Play

ALTV opposes the play or pay proposal because the *Notice* links it to the (three percent) proportional hours proposal.[35] Nonetheless, the proposal may have some positive attributes as a stand alone plan. Indeed, the FCC's current rules allow broadcasters to meet their CTA requirements by sponsoring core programs aired on other stations in the same market.[36]

The *Notice* however, expresses some concern that under the plan children's educational programming could be limited to public broadcasting or to less popular commercial stations, resulting in less exposure for children. Also, the amount paid under this approach may be insufficient to finance high quality programs.

If the FCC pursues this approach as a stand alone plan, it must avoid the temptation to enact intrusive regulations. The FCC is ill equipped to get into the financial aspects of children's program production. Moreover, the concept of programming being relegated to less popular channels does not mean the programs will not be viewed. In a multichannel world, the critical issue is whether kids can find the programs. For example, even though cable networks such as *Nickelodeon* or even the *Cartoon Channel* have lower ratings when compared to the major

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[35]*Notice* at 9.

[36]*See* 47 C.F.R. §73.671 n.2.

broadcast networks, children turn to these networks because they know they will find their programs on these channels -- twenty four hours a day. Accordingly, the creation of an educational channel may reach more kids, even though the channel has low overall ratings. Finally, the FCC simply should not be involved in making regulatory determinations that direct program investment to specific, more popular broadcast channels.

F. Menu Approach

We disagree with the Center for Media Education's premise -- that the three-hours-per-week core programming requirement is insufficient in light of added capacity. As noted above, there is no justification for extending, much less increasing, the children's television core programming obligation in the digital world.[37] Nonetheless, to the extent the Commission decides to extend the children's core educational programming requirements to digital television, the menu approach does offer stations some needed flexibility. The three elements contained in the *Notice* provide a starting point for a discussion of a menu approach.[38] Moreover, we agree with the idea that stations should have the freedom to place core programming on *one* digital channel. Additional flexibility would be necessary for this approach to be a viable option.

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[37]For the same reason we oppose the daily core programming obligation. No justification has been presented to increase the core programming requirement in the digital world.

[38]*Notice at 10.* Under this approach stations would have the option of: (1) providing additional core programming; 2) providing broadband or data casting services to schools and libraries; or 3) supporting the production of additional children's core programs by local public stations or other non-commercial program producers. While we disagree with the attempt to increase the core programming obligation, the other elements may be worth exploring. We would note, however, that supporting the production of additional core children's programs should not be limited to noncommercial entities, but expanded to any children's program producer.

G. Rules Governing Preemption in the Digital World are Premature

We agree with the *Notice* that digital broadcasting will afford stations the opportunity to air multiple program streams. As a result, the need to preempt core children's program is likely to diminish as digital television is deployed. At this point, however, we see no need for the FCC to enact specific rules governing preemptions in the digital world. It is entirely possible that the issue will resolve itself without the need for government interference. We see no need for the Commission to attempt to fashion specific rules governing the number of times a program may be preempted and still be considered "regularly scheduled." Before such rules can be crafted, it would make sense to see how the marketplace develops. It is simply impossible to make any judgements regarding rescheduling practices in the digital at this time. Any decision made today would in all likelihood be wrong.

H. Commercial Limits and Website Access

ALTV disagrees with attempts to expand the children's commercial limits beyond their existing parameters. Section 303(b) expressly limits the amount of commercialization that may be provided during children's programs.[39] Section 303(c), however, gives the FCC the discretion to modify these rules.

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[39]47 U.S.C. §303(b) states in relevant part "the standards prescribed under subsection (a) shall include the requirement that each commercial television broadcast licensee shall limit the duration of advertising in children's television programming to not more than 10.5 minutes per hour on weekends and not more than 12 minutes per hour on weekdays."

Consistent with previous observations, there is no justification for expanding these requirements, (including the policies set forth in the *1974 Policy Statement* on children's programming), beyond children's programs broadcast as part of a free, over-the-air television service.[40] CME offers no legal basis for expanding these requirements to subscription based services. In this regard, §336 cannot be read to extend these requirements to ancillary and supplemental services.[41]

ALTV is especially troubled with the attempt to regulate website links during children's programs. CME proposes to prohibit all direct links to commercial websites during children's programming. The Commission has absolutely no evidence that such links will be used, much less abused, during children's programs. If enacted the proposal will effectively eliminate all interactive capability during children's programs. The FCC will be responsible for stifling what may turn out to be a major source of financing for children's core educational programs. Such a short sighted policy should not be adopted.

It is simply too early to try to craft specific rules governing website access during children's programs. The *Notice's* attempt to draw distinctions between commercial and non-commercial websites makes little sense. For example, what is the difference between a commercial website offering *Sesame Street* toys and a public television website offering the

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[40]Indeed, pursuant to §303(c), the FCC has the discretion to modify these limitations. For example the FCC could find that these limitations are no longer appropriate in the digital world.

[41]*See, supra*, at

same or similar products. Almost every non-profit entity in the Untied States sells something on its website. Can one truly draw a distinction between a link to a non-profit school related book store and Amazon.com. Attempting to draw such distinctions and classify websites in not only beyond the FCC's jurisdiction, but it will involve the agency into a legal quagmire. On this issue, patience is a virtue.

I. Definition of Commercial Matter

We do not believe the FCC should redefine commercial matter. The legislative history of the Children's Television Act expressly stated that promotional announcements, station identification announcements and public service announcements were not considered to be commercial matter under the statute.[42] These messages can be easily distinguished from traditional advertisement for which a charge is made.

Attempts to reclassify these so called "interruptions" as commercial matter may have significant negative consequences to the children's television marketplace. First, the amount of actual program material contained in syndicated and/or network programs are pre-set. The amount of time in a program does not generally vary from station to station. Thus, changing the definition of commercial matter to include station promotional announcements or public service announcements will not necessarily increase the amount of actual program time.

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[42]*See* H.R. Rep No. 385, 101st Cong., 1st Sess. 15-16 (1989); S. Rep No. 227 101st Cong., 1st Sess. 21 (1989)

The only impact will be to further squeeze out advertising during children's programs or prevent stations from promoting their own shows. In either case, the proposal will make children's programs less attractive to local stations. The plan will simply exacerbate the market-place problems children's programs are currently experiencing on free, over-the-air television. This is especially true with respect to the children's syndication market.[43]

The *Notice* offers no explanation why public service announcements should be considered as commercial matter. These messages are not attempting to sell commercial goods to children. To the contrary the FCC, has chastised the industry for not providing enough public service announcements. The *Notice* creates a tremendous incentive not to carry such announcements, even though many of these announcements may be beneficial to children.

J. The FCC Should Not Adopt Rules Governing Placement of Promotions

It is far from clear whether the FCC has the jurisdiction to adopt rules regarding promotional placement. The Commission's jurisdiction in the area of advertising has been limited. For example, in 1985 the FCC eliminated its specific policies relating to false and deceptive advertising, while maintaining the underlying public interest responsibility not to broadcast advertising known to be false or misleading.

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[43] *Reviving Kids Syndie,* Electronic Media, December 18, 2000 at 1, 37.

The Federal Trade Commission's Report on *Marketing Violent Entertainment to Children* addressed many of the issues raised by the *Notice*.[44] In that Report the FTC noted that television broadcasters are addressing the issue voluntarily:

> Documents provided to the Commission suggest that almost all the major television networks have guidelines governing the airing of commercials for PG-13 and R films. In general, advertising for PG-13 films is evaluated on a case by case basis, depending on the content of the ad and the film. Half the networks have policies limiting the airing of ads for R-rated films (e.g., to news and sports programs, or only after 9 or 10 PM.); the others evaluate these ads on an individual basis.[45]

Moreover, it is worth noting that after examining the issue, the FTC declined to adopt rules governing the placement of promotions.

> In letters signed by Chairman Robert Pitofsky, the Commission states that the review by its staff concluded that "significant and unsettled First Amendment issues exist that may affect the viability of an FTC action or remedy." The Commission would likely face considerable difficulties in proving a deception or unfairness case, and questioned whether legal action premised on self regulatory program would provide a disincentive to self-regulation." Finally whatever the outcome of FTC enforcement actions under these theories, it seems clear that because of the substantial First Amendment protections accorded these products, a comprehensive an effective self regulatory response could have a more prompt and substantial impact on the problems described in the Commission's report that would FTC enforcement actions.[46]

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[44]*Marketing Violent Entertainment to Children: A Review of Self Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries*, Federal Trade Commission, September 2000.(hereinafter cited as *FTC Report.*)

[45]*FTC Report* at 12.

[46] FTC Press Release, November 21, 2000.(describing a letter released by the FTC in response of members of Congress) Also, the examples cited by Commission Tristani involved the placement of advertising on a cable channel, not a local, over-the-air television station. Moreover they were not violent, sexually explicit, and did not use indecent language. It is

The *Notice* also proposes to subject advertisement or product promotion to the rating system currently used for broadcast and cable programming. While Section 1521 of the 1996 Telecommunication Act authorizes the industry and ultimately the FCC to establish a rating system for *programming*, it did not cover advertising or promotional messages. Accordingly, the FCC has no authority to establish rules requiring that advertisement be rated, encoded and subject to V-chip transmissions.

Finally, the FCC proposes to require that promotions be rated and be consistent with the program in which they appear. In other words, a promotional announcements broadcast during a children's show (TV-Y or TV Y-7) must be consistent with the ratings of these programs. Again the FTC, which has the better jurisdictional claim, has declined to issue such a draconian rule. Finally, the government's desire to protect children does not give it the right to abrogate basic First Amendment rights.[47]

IV. CONCLUSION

For the above stated reasons, ALTV believes that it is premature to craft rules governing the children's television obligations of over-the-air digital television stations. Digital broadcasting should be given the opportunity to grow before imposing new rules on the service.

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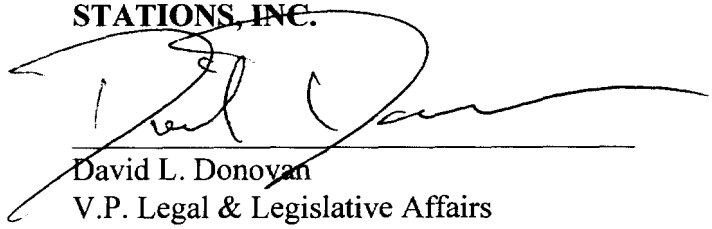
difficult to determine how the Government could craft rules to govern these situations. Such rules would be extremely subjective, and most likely unconstitutionally vague.

[47]*See e.g., United States v. Playboy Entertainment Group*, 120 S. Ct. 1878 (2000)

The Commission's time would be better spent adopting policies, such as digital must carry, that accelerate the deployment of digital television.

Respectfully Submitted,

ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.



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